Office-Supreme Court, U.S.
FILED
SEP 6 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-2109

In the Supreme Court of the United States

OCTOBER TERM, 1983

PB, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Couch v. *United States*, 409 U.S. 322 4

Fisher v. *United States*, 425 U.S. 391 ..... 4, 5

Grand Jury Impaneled Jan. 21, 1975, In re, 541 F.2d 373 5

Shapiro v. *United States*, 335 U.S. 1 5

United States v. *Cortese*, 448 F. Supp. 845, vacated, 614 F.2d 914 ..... 1, 2, 5

United States v. *Nobles*, 422 U.S. 225 5

United States v. *Silvestain*, 668 F.2d 1161 5

Constitution and statute:

U.S. Const. Amend. V 1, 3, 5

Internal Revenue Code of 1954, 26 U.S.C. 7605(b) 3

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In this Internal Revenue Service Summons enforcement case, petitioner seeks review of the decision below holding that the Fifth Amendment was not violated by enforcement of a summons for documents relating to him that was issued to a third party.

1. The pertinent facts may be summarized as follows. As a result of information received from a confidential informant, the Internal Revenue Service instituted an investigation into the tax liabilities of certain attorneys involved in negligence work in Philadelphia. See *United States* v. *Cortese*, 614 F.2d 914, 917 (3d Cir. 1980). As part of the investigation, an IRS special agent issued summonses to obtain the contingency fee arrangements and statements of distribution filed by these individuals with the prothonotary of

the Court of Common Pleas of Philadelphia County. Under the local rules of that court,[1] attorneys were required to file such documents with the prothonotary.

Upon refusal of the prothonotary to provide the summoned information, the government instituted this proceeding in the United States District Court for the Eastern District of Pennsylvania to compel compliance with the summonses. Nine attorneys, including the petitioner PB, intervened and moved to dismiss the complaint and quash the summonses (Pet. App. A-6). See *United States* v. *Cortese, supra*, 614 F.2d at 917. The district court initially granted their motion, but the court of appeals vacated that decision and remanded for further proceedings (Pet. App. A-3 to A-4). *United States* v. *Cortese*, 448 F. Supp. 845 (E.D. Pa. 1978), vacated, 614 F.2d 914 (3d Cir. 1980).

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[1]At the time in question, Local Rule 202 of the Court of Common Pleas of Philadelphia County, Pa. (repealed May 20, 1976), provided in pertinent part (Pet. App. A-1 and A-2):

> (f) Every attorney who enters into an agreement with a client with reference to legal representation for damages for death or personal injuries sustained either at common law or under the provisions of the Workmen's Compensation Act, or for damages in land condemnation proceedings, under the terms of which agreement the attorney's compensation is wholly or partly on a contingent basis, shall file with the Prothonotary:
>
> (1) Within 20 days of the date of its execution, an executed copy of the agreement; and
>
> (2) Within 20 days of the final disposition of the case, a statement showing in reasonable detail the disposition of the amount received.
>
> The Prothonotary shall assign to each agreement a number and shall make a record thereof in a separate docket. The Prothonotary shall record in the same docket the closing statement above referred to. The copy of the agreement, the copy of the closing statement and the docket shall be impounded subject to inspection only by Order of the Court, by the client or by the Disciplinary Board of the Supreme Court of Pennsylvania.

On remand the district court ordered enforcement of the summonses (Pet. App. A-13, A-16; R. 204a-237a),[2] finding *inter alia*, that disclosure would not violate the intervenors' Fifth Amendment rights because the summonses were directed to the prothonotary, not the intervenors, and because the records sought "were required by the Court to be filed in connection with the practice of law [and were] in the Court's custody" (Pet. App. A-14; R. 233a)[3] Although the intervenors appealed, they failed to obtain a stay. Accordingly, the prothonotary, pursuant to the government's request, delivered to the Internal Revenue Service all of the summoned documents that he was able to locate. The records relating to petitioner, however, were not turned over because they had been returned to him after issuance of the summons by order of the Court of Common Pleas of Philadelphia County (Pet. App. B A-7).

The court of appeals held that this case was moot insofar as it concerned the documents already furnished to the IRS (Pet. App. A-7). However, the court held (*id.* at A-7 to A-8) that the appeal was not moot with respect to petitioner's records because the government was contemplating contempt proceedings against the prothonotary for relinquishing possession of those documents. The court then affirmed the district court's order insofar as it ordered enforcement of the summons for petitioner's records (*id.* at A-8 to A-9).

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[2]"R." refers to the record appendix in the court of appeals.

[3]The district court also found that the investigation was conducted in good faith (R. 214a), that the summonses had been issued for a proper purpose (*id.* at 213a-214a), that the records sought were relevant (*id.* at 227a-230a), that the Internal Revenue Service was not serving as an information-gathering agency for other agencies (*id.* at 221a), that enforcement of the summonses would not violate the attorney-client privilege (*id.* at 234a-235a), and that enforcement did not constitute a second inspection within the meaning of Section 7605(b) of the Internal Revenue Code of 1954 (26 U.S.C.) (R. 235a-236a).

2. Petitioner's sole contention (Pet. 8-12) is that the decision below requiring the prothonotary to turn over petitioner's documents violates petitioner's Fifth Amendment privilege against self-incrimination and is contrary to *Couch* v. *United States*, 409 U.S. 322, 336 (1973). This argument misreads *Couch* and ignores the record in this case.

As noted, the prothonotary does not have the remainder of the summoned records and is no longer able to comply with the summons. Those records are now in petitioner's possession, and the government has not yet sought an order requiring petitioner to return the records to the prothonotary. Thus, the question whether petitioner could be compelled to return the records to the prothonotary or to surrender them to the government is not before this Court. The only issue here is whether the prothonotary was properly ordered to surrender the documents.[4]

Petitioner's argument here centers on his assertion that the summons, although issued to the prothonotary, amounted to governmental compulsion against him, because he was required to file the documents with the prothonotary. Petitioner's argument lacks merit.

The law is clear that the Fifth Amendment privilege is a purely personal privilege that prohibits compulsion against the person asserting the privilege. *Couch* v. *United States, supra; Fisher* v. *United States*, 425 U.S. 391 (1976). Thus, the privilege is generally not available when records are sought from a third party, since ownership of documents without possession is not sufficient to invoke the protection of the privilege. *Couch* v. *United States, supra; United*

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[4]As this Court held in *Couch*, "the rights and obligation of the parties became fixed when the summons was served, and the [subsequent] transfer [of the documents] did not alter them." 409 U.S. at 329 n.9.

States v. *Silvestain*, 668 F.2d 1161, 1164 (10th Cir. 1982). Moreover, records required to be kept by law are not protected by the privilege. *Shapiro* v. *United States*, 335 U.S. 1, 32, 36 (1948).

Here, the summonses were directed at the prothonotary, not at petitioner or the other intervenors; the records sought were required to be kept by law; and the court of appeals correctly determined, contrary to petitioner's contention (Pet. 11), that the prothonotary had full custody and possession of the records. *United States* v. *Cortese, supra*, 614 F.2d at 917; see also *In re Grand Jury Impaneled Jan. 21, 1975*, 541 F.2d 373, 377 (3d Cir. 1976). Thus, there was no compulsion against petitioner, and the lower courts properly held that enforcement of the summons issued to the prothonotary would not violate petitioner's Fifth Amendment rights.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1983

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[5]This Court has made clear that the Fifth Amendment privilege "applies only when the accused is compelled to make a *testimonial* communication that is incriminating." *Fisher, supra*, 425 U.S. at 408. The Court has stressed (*id.* at 401, quoting *United States* v. *Nobles*, 422 U.S. 225, 233 n.7 (1975)) that "the Fifth Amendment protects against 'compelled self-incrimination, not [the disclosure of] private information.' " Here, in seeking records from the prothonotary, the government is exerting no compulsion upon petitioner. All the compulsion in this case is directed toward the prothonotary. Thus petitioner's argument (Pet. 10-11) that enforcement of the summons would invade privacy interests is irrelevant for Fifth Amendment purposes.

DOJ-1983-09